

Johan Froneman Constitutional Court Oral History Project 6th December 2011

Int This is an interview with Justice Johan Froneman, and it's the 6th of December 2011. Johan, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

JF It's my pleasure, although I'm nervous.

Int I wondered if we could start talking about early childhood memories in terms of where and when you were born, and your experiences that may have led you to consider social justice and human rights, as part of your professional trajectory?

JF Well, I was born on a farm in the Eastern Cape...I'm lying, in East London, but I grew up on a farm in the Eastern Cape. And I think that experience on the farm, not initially when you're young and small, but you eventually realise that there is a difference between you as the farmer's son, and the workers and children that you were playing with. So I think that gradually entered into my thinking or understanding of things, not in the sense of that I felt that people were being badly treated. I think on our farm there was a very good but paternalistic relationship between my family and the families on the farm. But, as I grew up, I realised that there's a huge gap between my circumstances and theirs and I think that's where it started really, where I realised that things aren't right.

Int In terms of that consciousness, how did that then build up in terms of...high school, university?

JF I think I was quite influenced also by my parents, and especially my mother. She's not religious in the fundamental way, but religious values counted a lot to her and our family. So we were taught in the Christian religion to respect other people, but that also led to a difficulty because if you respect other people then you ask your parents, well, why are other people, black people, specifically, not treated the same way? And I suppose gradually, in that sense, the consciousness grew. At school...I went to school in Bloemfontein, at a school called Grey College there, and there were some teachers who tried to make you think for yourself. So I think that's a gradual sort of process that really came to...for the first time really, came to...I don't know what the right word is...came to the fore in my first year at university.

Int And in terms of university, where did you go, what made you decide to do law? I presume you started with law?

JF I went to Stellenbosch University, it's an Afrikaans university in Stellenbosch. The decision to do law, I'm afraid, is not a very rational one (*laughs*). For some reason or another, I always thought I have two choices in life. I could either become a farmer, or I would become an advocate, as in lawyer. I don't know why.

Int And in terms of the experiences at Stellenbosch, it being...an Afrikaner university, in terms of radical politics, to what extent were you involved at all; was there any activism?

JF I would say the most influential person at Stellenbosch for my generation, was a person called Professor Johan Degenaar. He was in the Department of Political Philosophy there, and he started off as a lecturer in the theology department, and then his ideas on what Christianity meant changed from what the traditional ideas were, and he started off...or they allowed him to start off this. And he really helped us, I think, very critically, and I owe a tremendous debt to him for raising my consciousness in that regard. As far as activism is concerned, in my first year at university, Stellenbosch was very conservative. That year...there's an annual rugby match between Stellenbosch University and the University of Cape Town, and that year Stellenbosch still refused to play against UCT (University of Cape Town) because UCT, their team, included black or coloured people. So, my activism was restricted to those kind of things. We boycotted that game; we started some organisations, or were involved in organisations in Stellenbosch. Geoff Budlender, who's now at the Cape Bar and at the Legal Resources Centre, he was chairman of the UCT Student's Representative Council and in my first year, I remember, he came to Stellenbosch, he was invited by one of the organisations that I was involved with, to give a speech, and it was a time of turmoil, restive students, and the like, and he came and gave a speech in front of about two thousand conservative Afrikaans white students. And I thought it was very brave. And then also through Professor Degenaar, and the like, one came to hear about black activists and so on. I think it was in that year or in my first year or so, that Steve Biko was actually detained and died. And I just remember going home for a holiday, and saying to my parents, well, there's huge problems coming. But I don't think anybody else, or very few people in the Afrikaans community, I think countrywide, even knew who Steve Biko was. So that little bit of association with people like (Johan) Degenaar, (Geoff) Budlender and so on, at least made us know who he was. We didn't know him but we knew who he was, so that was the start of really becoming conscious and being involved. But not in the sense of...not involved in the kind of activism that people like Budlender and so on. It was localised Stellenbosch, we were in the minority, we didn't achieve much.

Int You...did make inroads in terms of the boycotts you mentioned, I was just wondering, in terms of your actual legal studies, was there any emphasis, for

example, on human rights law or public interest law? What was the emphasis really in terms of your legal studies?

JF I have to be careful now...no, I'm just joking, because I'm still attached in some way or another, and have friends at Stellenbosch University in the law faculty. But to be honest, as far as the law faculty is concerned, there wasn't anything of the sort. I was asked, the other day, the same kind of question, what do you remember about the law faculty and making you aware of it? And really not much. The most critical kind of thinking that I experienced in my law at Stellenbosch was, strangely enough, in contract law with Professor Gerhard Lubbe. For the rest there was a critical attitude towards the study of law, but I may be a bit harsh, but I can't remember anything now that the curriculum in the law faculty actually helped me much in that regard.

Int That's interesting... you would have been doing your LLB by the eighties, would that be correct?

JF Yes, I left Stellenbosch at the end, I think, of '75/'76, before I finished my LLB there and then I came to the University of South Africa, and I completed my LLB there. And that would have been the end of '77, I think.

Int So this was before the Pass Regulations would have been overturned?

JF Yes.

Int And then how did you proceed in terms of your legal career, I'm curious?

JF I come from the Eastern Cape. I met my wife at Unisa in Pretoria, I did my pupillage at the Pretoria Bar...I'll come back to that in a moment, and was there for a year. She finished also an LLB. And then we were in Pretoria for about a year, and then we went back to Grahamstown in the Eastern Cape, where I started practising as an advocate in 1979, I think.

Int And in terms of progression, your practice...did you go to the Bar? You mentioned the Pretoria Bar...

JF Yes, I said I want to get back to the Pretoria Bar story because when I got there, came from Stellenbosch, alright, it wasn't the most progressive, but at least it was fairly, in Afrikaans terms, *verlig* or progressive. The Pretoria Bar, at that stage, still had a colour bar, so the Constitution prevented blacks or Coloureds from belonging to the Pretoria Bar, and it was in my year there that they changed the Constitution. It took a long time. The first time they didn't get the necessary majority and so on. And in that process, there were people who

pushed that agenda in Pretoria, who are not generally regarded as being part of the struggle in South Africa. But people like Louis Harms and Kees van Dijkhorst and Chris Botha and Laurie Ackermann too. They were pushing it. So in terms of my Afrikaans background and reference, those were actually people who were also pushing for change in their own environment. You asked about my career at the Bar. I loved being an advocate, I loved practising at the Bar, I started in Grahamstown in about 1980, thereabouts. And took silk, I think in about '90, '91, and then I was appointed to the High Court in '94.

Int It was a crucial time period in 1994, the Constitutional Court was getting off the ground, I wondered what it meant for you to be on the Bench during that very important transitional period?

JF Well, it was a...I think, a once in a generation opportunity to become or be a judge right at the start of a new constitutional era, and it was even...well I won't say better, but more exciting because the Constitutional Court actually only got going in about '95/'96, so that first year in '94, was completely new ground for anybody, and many of the judges were conservative...it was a new thing, it was difficult, but if you were excited by it you could write judgments that were new, and that you believed in. It really was a wonderful time.

Int In terms of your observance of the Court, given that you'd been appointed in 2009 onto the Constitutional Court Bench, I wondered in the early days of the Court, what were some of the issues that sparked your interest, that may have in some way influenced your thinking while you were at the Bench...?

JF Of this Court?

Int Yes.

JF Well, certainly before the Court came into operation and before it started giving the judgments, it was very difficult as a judge in the High Court, to embrace the new ethos, because it's a whole new legal culture, tradition, and so on. So I gave a couple of judgments before the Constitutional Court really got going, and what I found tremendously heartening was, that the Constitutional Court...how can I say it...the Constitutional Court opened up this whole new tradition of thinking about the law and the infusion of constitutional values into all parts of the law and so on. So that was tremendously heartening and validating for people like myself, and there were many, but there were also very conservative people who didn't think that that is law. So when the Constitutional Court started giving those kind of judgments, it really helped people in the High Courts a great deal.

- Int ...You mentioned some of the judgments that you had given, I wondered whether you could talk a bit about that and the experience around that?
- JF I feel a bit hesitant to do it.
- Int Okay, fair enough, fair enough. Before you were appointed to the Constitutional Court, the years preceding that in terms of your legal trajectory...I know that you went to the Labour Court at some point?
- JF Yes, you asked me about some of the earlier judgments and I was hesitant, but I did give a couple of judgments that appeared to break some new ground, so in that sense I suppose people noticed me a bit. And then when the Labour Appeal Court, the new Labour Court and Labour Appeal Court, was started in 1996, I still don't know how, but I then became...I was nominated and became the Deputy Judge President of the Labour Appeal Court, that was also the first specialist Court doing things in terms of new constitutional kind of legislation. I was there for three years, also a wonderful experience. I learnt a lot from the Judge President, John Myburgh, and I've also known Edwin Cameron from university days, and we were together there as well. So that was a further boost for me. I had this...I don't know how else to express it...this privilege of being in at the start of the Constitution, this privilege of being in at the start of the new labour dispensation; it's a huge privilege.
- Int And then, Johan, you also served on the Supreme Court of Appeal as well?
- JF Yes, I was there for six months.
- Int Right. You're also known for your work in human rights at the University of Stellenbosch, and I wondered whether you could talk a bit about that?
- JF Well, once again I was lucky and I was privileged to be asked by the Department of Public Law at Stellenbosch, whether I would be interested in becoming, I think they call it an extraordinary professor, or something like that. And then I would go there once a year for about two weeks and give lectures. It was a huge benefit to me because work in the High Court is sometimes very humdrum, so that experience gave me something to work on...a wider perspective, and I enjoyed it very much. The people who involved me there were André van der Walt, Lourens du Plessis and Sandy Liebenberg, from the Department of Public Law, and it was actually Sandy (Liebenberg) who got me teaching in her LLM human rights programme. So they are also people that I owe a lot to.

- Int Yes, and I've met Sandy (Liebenberg), I'm just wondering how is LLM programme structured...are there seminars, how does it work?
- JF It's seminars, as I understand it, seminars throughout the year to students, on different topics, different human rights topics, and I was asked to give basically at that stage, the horizontal application of human rights under the Constitution, and so on.
- Int And in terms of visiting appointments, I wondered because I'd read that you'd been at Harvard and Oxford?
- JF It sounds much smarter than it is (*laughs*). When I was at the Labour Court, Professor Frank Michelman from Harvard came out, and I was then asked to give a talk at what was then Rand Afrikaans University, now UJ (University of Johannesburg), and I gave a talk, and he was there, he also gave one, and we met each other, and then at the end of my stint at the Labour Court, it was my long leave, and I wrote him a letter and I asked him, well, does he know of any place in the States, a university where I could go to for my long leave, and then he said, yes, come to Harvard and use my office. So he basically arranged it for me to go to Harvard. And then in 2008 Kathy Satchwell had been at the...I think it's the Socio Centre for...
- Int Legal Studies...
- JF Socio-Legal Studies, sorry, yes, at Oxford, and she put me into contact with the people there and they were kind enough to say, yes, please come. So I went.
- Int I wondered, Frank Michelman is known to be somewhat of an expert on constitutions, especially the South African one, I wondered whether you had the opportunity to talk a bit more about the constitutionalism lectures you may have given at Harvard?
- JF I was actually very intimidated getting there, because he wasn't there, he was in New York for the time that I was there, but he said, use my office, so I went there and sat in his office and basically read so much that I didn't know about. So as far as lectures there are concerned, I didn't really give much; I participated in sessions with students and I gave one or two. But Professor Michelman, I learnt a lot from him about constitutional law. He wrote a little book called *Brennan and Democracy*, on Justice Brennan, and I read that, and that set me on, on further reading and so on. So he's also a person that I owe a lot of gratitude to.

Int Johan, you are incredibly modest, but at some point you got appointed to the Constitution Court, I wondered whether you could talk a bit about your nomination, and did it come as a surprise to you?

JF Yes, the nomination came as a surprise. I still don't know how I got here and I'm not being overly modest about it, there's lots of other people who also wonder about it. I'll tell you why I put myself forward to be nominated. At that stage in the Eastern Cape, there was a bit of tension in the interviews for appointment of judges to the High Court, and there was a feeling that in the Judicial Services Commission, white candidates were being excluded because they're white. And there was tension about that. And then I spoke to Jeremy Pickering and we were fairly despondent at that stage about how we perceived, perhaps wrongly, how things were going. And I think in our discussions we said, well, we do what we think we should do, and he and others also supported me for putting my name forward, and I decided to do it on my own terms. I asked Sandy (Liebenberg) whether she would nominate me, she agreed. And I put my name forward, in the papers that you gave, I referred to previous things that I'd published and so on, I didn't try and hide that I was Afrikaans, that I wasn't part of the struggle, that I'd come from the privileged divide of it, and I thought, well, that's the way I'm going then. And then I got to the interviews and other than many of the other candidates I was treated, I suppose, with kid gloves and I think reading the things that I'd said before, perhaps changed people's minds. It certainly did, I was told afterwards. So I got a good hearing. And how and why I was actually appointed, well, you know as well as I do.

Int I wondered what your experience was in terms of just the...my mandate is to really focus until 2009, and I wondered whether you could just talk a little bit about having come from the High Court with its own set of formalities and structure, how coming to the Constitutional Court may have, in some ways, been different for you in terms of the early days in 2009?

JF It was different but I...you say I'm saying it too much, but I was also privileged in the Eastern Cape. We had a Judge President Somyalo, who was a very wise old man, he was perhaps not the best lawyer around, but he's a very wise man, and at the start the Eastern Cape was regarded as exclusively white and male and he came in as Judge President, and people there...I still think it was probably the most collegial court, High Court, that existed in South Africa at that stage. There were problems at many of the other courts, and we were lucky that we didn't have it, because of the leadership of Judge Somyalo, and also the assistance of old white judges like many others, and also myself. So we worked together, so it was a collegial atmosphere. So when I got here I was told about the collegiality of this Court, and I experienced it; people were friendly, I never felt that I was being excluded and so on. But it wasn't a big change in the sense of the collegiality. In terms of the work it was, yes. But Kate O'Regan said to me when I got here, if this is

the kind of work that you like; it's the best job in the world. And I like that kind of work and it is the best job in the world (*laughs*).

Int Good for you (*laughs*). I also wondered, Johan, just in terms of reflection, if you could reflect on, from the 1995 period, the first cases, Makwanyane (*S v Makwanyane and Another*) the constitutional cases that may have in some ways really captured your attention and in some ways have influenced your thinking as a lawyer, as an advocate, as a judge?

JF Well, Makwanyane (*S v Makwanyane and Another*) is, I think, the earliest and the most important, and the fact that so many of the judges wrote it for themselves. I think that really established this Court and its importance, because the death penalty was something that I simply think that politicians didn't want to confront, and they left it to this Court. And this Court then did it, and it's been accepted. So I think that established the legitimacy of the Court. Later on, what was important to me, is pharmaceuticals (*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*), where Judge (Arthur) Chaskalson, I think he said, you can't have two systems of law, you have only one system of law. That was important, I think, for people on the ground. In the High Courts we still believed that, and maybe even now, still believe that there is a common law and a constitutional law. So Makwanyane (*S v Makwanyane and Another*), and pharmaceuticals (*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*), Carmichele (*Carmichele v Minister of Safety and Security*), and Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) of course. I think I'm interested in socio-economic rights; it's probably one of the most important judgments in the world on that kind of right. So you've caught me a bit unawares, but those are the cases that I think are pertinent.

Int Fair enough. Coming from the Eastern Cape where there's been huge problems with social welfare, I wondered whether you could really reflect on the opportunities being as a Constitutional Court judge gives you with respect to socio-economic rights.

JF I'll start off by saying something about my experience in the Eastern Cape with those social welfare things. I think what happened is that the provincial government was new, the Ciskei, Transkei, Eastern Cape, had to be incorporated, it was something new. And eventually, I think it's the way it should work, is that courts speak to legislatures and the Executive and there's this sort of a debate about it. I think that happened very slowly in the Eastern Cape. There were problems with execution of court orders. I think that was due to administrative difficulties, no obvious disobedience of the courts. So to come back to socio-economic rights, if South Africa is going to succeed as a country, then the majority of the people, I really do think it is still the majority of the people, are poor, and until they have the means to live a dignified life, it's not a real...the promise of the Constitution will not have been met. So in that

sense, to emphasise that our Constitution is one that is premised on the assumption that people will have the basic means to live a dignified life. So as far as that is concerned, then I think socio-economic rights and how they are developed, not on its own, also in conjunction with economic growth and the like, that is what is going to determine whether we are going to be a successful society or not.

Int Besides socio-economic rights, I was wondering, in terms of the transition to democracy, what do you think are some of the challenges that existed when you first started in the High Court, on the Bench, and what are the challenges that remain for South Africa?

JF I think as far as...if I can use as an example, socio-economic rights, *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* started off and I think it's a great judgment but it wanted to give the executive and the legislative arms, the opportunity and the means to effect, or give effect to the socio-economic rights. And it didn't want this Court to tell Parliament what to do. I think that if the executive, the legislature, do what the Constitution says they should do, the role of this Court will be less and less. To the extent that it's not done people will turn to the Court in order to try and attain what they might not attain through the ordinary political democratic process. I think it is better for the country that it is done through the political and the democratic processing in elections and representation and the like, but I think that if it's not done then the Constitutional Court is the last resort and it has to do what it has to do. But there are some people who are saying that we are moving in that direction. I hope not. Because I think once you get to that situation then the tension between the courts and the other arms of government become very great, and the dangers associated with that become more acute.

Int Johan, I've asked you a range of questions, I'm wondering whether there's anything I've neglected to ask you, which you'd like to be included in your oral history?

JF You've asked me a lot of questions, I was nervous about it, and I don't want to add anything (*laughs*), thank you very much.

Int Thank you very much for the opportunity to interview you and I hope that we have another opportunity when you have spent much more time on the Bench as a Constitutional Court Judge.

JF Okay. Thank you very much.

Collection Number: AG3368

CONSTITUTIONAL COURT TRUST ORAL HISTORY PROJECT

PUBLISHER:

Publisher:- **Historical Papers Research Archive**

Location:- **Johannesburg**

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